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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 262.

JOSEPH NAPLES,
Petitioner,

vs.

E. L. MAXWELL,
Warden, Ohio State Penitentiary,
Respondent.

BRIEF IN REPLY TO RESPONDENT'S OPPOSITION.

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Respondent, in its brief at page 3, after stating that Detective Brace typed the affidavit for search warrant, states "that Brace believed and had cause to believe that gambling equipment, guns, narcotics, explosives, gambling records and monetary proceeds, stolen goods and contraband were in the Naples residence," then digresses from the facts stated within the affidavit or brought to the attention of the issuing magistrate and states: "was based upon his (Brace's) knowledge of previous searches of the houses of Naples and one of his brothers."

The basis for Detective Brace's knowledge of the above items to be searched for is very clearly set out in the affidavit itself, when Detective Brace typed, **"This Affidavit is based on facts as follows: That affiant has received information which he believes to be reliable and true, that the above-named items, or a part thereof, are being unlawfully kept on said premises in violation of law."** (Emphasis added.)

Everything that precedes the statement in the affidavit, "based on facts as follows:" regarding the items is merely a statement of legal conclusions.

Beauchamp v. United States, 154 F. 2d 413, 415 (Sixth Circuit 1946), when interpreting the same situation in an indictment, stated:

> "A general expression in an indictment may be restricted and confined to a precise and definite fact by a description under a videlicet or scilicet."

The dissenting opinion in *Reno v. United States,* 317 F. 2d 499, 506 (Fifth Circuit 1963) describes the points we are making very succinctly:

> "We may be sure that all that portion of the indictment which precedes the videlicet or scilicet 'that is to say' amounts to no more than the statement of a legal conclusion * * * We normally look to what comes after the videlicet or scilicet to see precisely what the writer * * * had in mind. 'The use of the videlicet is to point out, particularize, or render more specific that which has been previously stated in general language only; also to explain that which is doubtful or obscure. (Black Law Dictionary 4th ed. 1951).' "

The affidavit typed by Detective Brace was in words of his own choosing that he had no personal knowledge that the certain items were on the premises, but that he had received such information from an unidentified source.

This Court stated, in *Aquilar v. Texas,* 378 U. S. 108, 109, Footnote No. 1:

> "The record does not reveal, nor is it claimed, that any other information was brought to the attention of the Justice of the Peace. It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention. Giordenello v. United States, 357 U. S. 480, 486, 2 L. ed 2d 1503, 1509, 78 S. Ct. 1245; 79 C. J. S.

872 (collecting cases). In Giordenello, the Government pointed out that the officer who obtained the warrant 'had kept petitioner under surveillance for about one month prior to the arrest.' The Court of course ignored this evidence, since it had not been brought to the magistrate's attention. The fact that the police may have kept petitioner's house under surveillance is thus completely irrelevant in this case, for, in applying for the warrant, the police did not mention any surveillance * * *."

Attached to our petition for rehearing in the Court of Appeals for the Sixth Circuit is the following affidavit dated May 3, 1968, of Municipal Court Judge Martin P. Joyce:

"STATE OF OHIO,
COUNTY OF MAHONING, SS.

"I, MARTIN P. JOYCE, being duly sworn, depose and say that I am a Judge of the Municipal Court of the City of Youngstown, Ohio, and was the issuing magistrate for the search warrant in the petitioner's case herein.

"That Detective Gerald Brace, when he appeared before me on July 24, 1962, with the typewritten affidavit for search warrant involved in the present proceedings, did not state to me and it did not appear in the affidavit that he had personal knowledge that explosives, gambling equipment, guns, narcotics, gambling records, monetary proceeds, stolen goods and any contraband were in the property located at 605 Carlotta Drive, Youngstown, Ohio; that Detective Brace did state in the affidavit that he received information which he believed to be reliable and true that the above-named items, or a part thereof, were being unlawfully kept on the above-stated premises; that the only fact to support Detective Brace's statement that those items were contained in the house was that he had received information, but no explanation was

made by him as to why he believed said information to be reliable and true.

"That no other person appeared before me and gave any other affidavits in support of the search warrant; that no mention was made by Detective Brace regarding any knowledge obtained by him regarding the items set out in the affidavit, and he never mentioned any basis of personal knowledge that the items listed in the affidavit were contained in the residence at 605 Carlotta Drive, Youngstown, Ohio; that Detective Brace stated an informant said there was a secret room in the cellar of 605 Carlotta Drive, Youngstown, Ohio, but at no time was any mention made of the reliability of the informant, and nothing was said that the items above set out were in the secret room.

"That no description was given of the gambling equipment, gambling records or monetary proceeds, and no description was given as to the explosives, guns, narcotics, stolen goods and any contraband, as typed in the affidavit.

"That when Detective Brace informed me about a secret room in the cellar, I printed that in at the bottom of the affidavit and in the warrant, together with the additional information Detective Brace gave me on July 24, 1962 (Joseph Naples admitted to officers that he is a part of the Naples gambling operation).

"Further affiant saith not.

MARTIN P. JOYCE."

CONCLUSION.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari should be granted.

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